

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOHN DETTELIS,

Plaintiff,

Case # 17-CV-407-FPG

v.

DECISION AND ORDER

GERALD ZIMMERMAN, et al.

Defendants.

INTRODUCTION

Plaintiff commenced this action on May 12, 2017 and was represented by attorney Matthew Albert. ECF No. 1. On November 30, 2017, the Court granted Defendants' Motions to Dismiss. ECF No. 11. Plaintiff filed a Motion for Leave to Appeal *in forma pauperis* pursuant to 28 U.S.C. § 1915 and Rule 24 of the Federal Rules of Appellate Procedure. ECF No. 16. For the reasons stated below, Plaintiff's Motion is denied without prejudice.

LEGAL STANDARD

I. Procedural Requirements

Rule 24 provides, in relevant part, that "a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court." Fed. R. App. P. 24(a)(1). However, "[a] party who was permitted to proceed in forma pauperis in the district-court action ... may proceed on appeal in forma pauperis without further authorization[.]" *Id.* at 24(a)(3). The motion to appeal *in forma pauperis* must include an affidavit that: "(A) shows in the detail prescribed by Form 4 of the Appendix of Forms the party's inability to pay or to give security for fees and costs; (B) claims an entitlement to redress; and (C) states the issues that the party intends to present on appeal." *Id.* at 24(a)(1)(A)-(C). "If the district court denies the motion, it must state its reasons in writing." *Id.* at 24(a)(2).

II. *In Forma Pauperis* Determination

Plaintiff bears the burden of establishing his or her indigence. *See Potnick v. E. State Hosp.*, 701 F.2d 243, 244 (2d Cir. 1983). “[O]ne [need not] be absolutely destitute to enjoy the benefit” of the *in forma pauperis* statute. *Adkins v. DuPont de Nemours & Co.*, 335 U.S. 331, 339 (1948). Rather, “[a]n affidavit to proceed *in forma pauperis* is sufficient if it indicates that one cannot, because of his poverty, afford to pay the costs of litigation and still provide himself and his dependents with the necessities of life.” *Kilichowski v. Hocky*, No. 99-CV-2874 JG, 1999 WL 504285, at *1 (E.D.N.Y. July 5, 1999). “If it appears that an applicant’s access to [] court has not been blocked by his financial condition; rather [that] he is merely in the position of having to weigh the financial constraints posed if he pursues [his position] against the merits of his case, then a court properly exercises its discretion to deny the application.” *Fridman v. City of New York*, 195 F. Supp. 2d 534, 537 (S.D.N.Y. 2002) (citing *Sears, Roebuck and Co. v. Sears*, 686 F. Supp. 385, 385 (N.D.N.Y. 1988), *aff’d* 865 F.2d 22 (2d Cir. 1988)) (internal quotations omitted) (alterations in original).

DISCUSSION

Plaintiff did not proceed *in forma pauperis* in the district court action in this matter. Therefore, Plaintiff requires authorization to proceed on appeal *in forma pauperis* and has moved for such relief. ECF No. 16.

Plaintiff has shown in detail his inability to pay or to give security for fees and costs, but he has not satisfied the other procedural requirements of Rule 24. Plaintiff has not stated in an affidavit the issues that he intends to present on appeal, *see* Fed. R. App. P. 24(a)(1)(C), nor has he claimed an entitlement to relief. *See* Fed. R. App. P. 24(a)(1)(B). This information assists the Court in determining whether an appeal is taken in good faith. *See* 28 U.S.C. § 1915(a)(3) (“An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken


in good faith.”). The Court cannot grant Plaintiff’s motion given his failure to fully comply with these rules.

CONCLUSION

For the reasons stated, Plaintiff’s Motion for Leave to Appeal *in forma pauperis* (ECF No. 16) is DENIED WITHOUT PREJUDICE. Pursuant to Rule 24(a)(5) of the Federal Rules of Appellate Procedure, Plaintiff may file a motion to proceed *in forma pauperis* in the Court of Appeals within 30 days of this Decision and Order, which constitutes “Notice of District Court’s Denial” pursuant to Rule 24(a)(4).

IT IS SO ORDERED.

Dated: March 10, 2018
Rochester, New York



HON. FRANK P. GERACI, JR.
Chief Judge
United States District Court